Supreme Court, U.S.
FILED
AUG 31 2015
OFFICE OF THE CLERK

No. 14-280

IN THE

Supreme Court of the United States

HENRY MONTGOMERY,

Petitioner,

vs.

STATE OF LOUISIANA,

Respondent.

On Writ of Certiorari to the Louisiana Supreme Court

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Did *Miller* v. *Alabama*, 132 S. Ct. 2455 (2012) adopt a new substantive rule that applies retroactively to cases on collateral review?

2. Does this Court have jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to this Court's decision in *Miller* v. *Alabama*?

This brief *amicus curiae* will address only Question 1.

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves an attempt to expand the previously narrow and well understood "first exception" to

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1. The parties have filed blanket consents to *amicus* briefs.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

the anti-retroactivity rule of *Teague* v. *Lane*. Such an expansion would open up criminal judgments to reexamination long after the victims of crime had justifiably believed that those judgments were final and that they could close the book on a painful chapter of their lives. It would do so in cases where there is no question of innocence at all, neither innocence of the crime nor "innocence of the penalty" as that term has been used in this Court's jurisprudence.

Such a result would be severely detrimental to the interests of victims of crime that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On November 13, 1963, petitioner Henry Montgomery, then age 17, murdered East Baton Rouge Deputy Sheriff Charles Hurt in the performance of his duty. See Brief for Petitioner 3, 6. The initial trial was indeed conducted at a time of high local passion, as petitioner says, but the Louisiana Supreme Court completely cured that problem, reversing the initial conviction and death sentence on that ground. See *State* v. *Montgomery*, 248 La. 713, 728-729, 181 So. 2d 756, 762 (1966).

The retrial which produced the judgment being attacked in this case was held over five years after the crime, long after those passions had time to cool. *State* v. *Montgomery*, 257 La. 461, 462, 242 So. 2d 818, 818 (1970). "[T]he jury returned a verdict of guilty without capital punishment; and the defendant was given a life sentence in the state penitentiary."

Petitioner asserts that he "had no opportunity to present any evidence—and certainly no evidence regarding his age and relevant attributes—in mitigation

of his sentence." Brief for Petitioner 3-4. His age would have been obvious to the jury. Two pages later petitioner describes testimony that was, in fact, given on relevant attributes. Brief for Petitioner 6. Regardless of how they may have been instructed to limit the use of this evidence, see *ibid.*, it is obvious that the second jury did consider it in mitigation, as they spared him from the death penalty. A verdict of manslaughter was also available if they believed that he " 'shot in panic' " and " 'demonstrate[d] an "inability to plan ahead." ' " See Brief for Petitioner 5-6.

The Louisiana Supreme Court affirmed on the second appeal. *State* v. *Montgomery*, 257 La., at 468, 242 So. 2d, at 820. The same court summarily denied a writ petition in 2001. From the citations given, it appears to be a jury discrimination claim. See *State ex rel. Montgomery* v. *State*, 783 So. 2d 381 (2001).

Following this Court's decision in *Miller* v. *Alabama*, Montgomery filed a new motion. The trial court denied it on retroactivity grounds, and the Louisiana Supreme Court affirmed, having resolved the issue earlier in *State* v. *Tate*, 130 So. 3d 829 (2013), a decision applying this Court's precedents in *Teague* v. *Lane*, 489 U. S. 288 (1989), and its progeny.

SUMMARY OF ARGUMENT

Murder is a unique crime in its "severity and irrevocability," this Court recognized in *Kennedy* v. *Louisiana*. The sentence for it should reach a point of true finality as well. Absent a strong showing of actual innocence, a judgment that has been affirmed through the usual review process should not be reopened. Innocence may be stretched to include "innocence of the penalty," meaning that the defendant was sentenced to a penalty greater than the law allows given

the crime and his individual characteristics, but it should be stretched no further.

The "first exception" to the anti-retroactivity rule of *Teague* v. *Lane* is an "actual innocence" rule. It has, to date, been reserved for rules that render the defendant innocent of the crime or "innocent of the penalty." It has never been applied to a claim that the defendant merely received a sentence within the legal range which the sentencer might or might not have chosen if a subsequently adopted rule had been in effect at the time. Rules of this type have been regularly barred from retroactive application by *Teague*, and they should continue to be.

A proposal by an *amicus* that the niche of noncapital Eighth Amendment sentencing claims should be exempted from the rule of *Teague* should be rejected. The compelling interests of victims of crime in the finality of the sentences of the perpetrators—an interest completely ignored by the *amicus* making the proposal—calls for rejection of it.

Montgomery received a just sentence for the crime he committed. He has had life and the opportunity to find meaning in it; Deputy Hurt has not. What he seeks is mercy, not justice. Mercy may very well be appropriate in this case, but the request should be addressed to the Governor and the Board of Pardons, not to this Court.

ARGUMENT

I. Murder is final; the sentence for it should be.

Victims are far too often forgotten in the weighing of interests in criminal cases. "[C]rime victims have legitimate interests in the outcomes of criminal cases as

well. Yet they will frequently run up against a system that pays virtually no attention to their concerns." D. Beloof, P Cassell, & S. Twist, Victims in Criminal Procedure 3 (2d ed. 2006).

That is certainly true of the "top side" briefs in this case. Between the briefs submitted by petitioner and supporting *amici*, there is much discussion of the interests in finality, yet the interests of victims are barely mentioned.

For the direct victim, murder is the ultimate finality. Deputy Charles Hurt never breathed the air of freedom again after November 13, 1963, because Henry Montgomery *chose* to take his life. The families of homicide victims are also victims of the crime, see, *e.g.*, Cal. Const., Art. I, § 28(e), and for them also the crime is completely final. Victims' families are permanently deprived of husbands, wives, fathers, mothers, brothers, and sisters. See *Brumfield* v. *Cain*, 576 U. S. __, 135 S. Ct. 2269, 2287, n. 4, 192 L. Ed. 2d 356, 374, n. 4 (2015) (Thomas, J., dissenting) (letter from victim's daughter). Parents are permanently deprived of their children and often of the grandchildren that will never be born. Amid all the discussion about "second chances," we must *never* forget that for the victims there will never be a second chance. "Victims and their families have no such feeling [of hope] for we have no hope of seeing, touching, talking, or sharing a moment with our loved one again." Pendergrass, A Victim's Perspective: Justice for Byron, IACJ J. 79, 86 (Summer 2008), http://iacj.org/PDF/IACJJournalIssue2.pdf (all Internet materials as visited August 27, 2015).

One comfort that our criminal justice system can offer is finality. Nothing can bring back the deceased victim, but the knowledge that the perpetrator of the atrocity will not escape just punishment does provide a sense of relief. See, *e.g.*, McEntee, Victims' Kin Found

Relief in Witnessing Execution, Los Angeles Daily News (Jan. 15, 1996), http://www.thefreelibrary.com/_/print/PrintArticle.aspx?id=83900464. Perfect certainty is achievable only with an executed death sentence, but a sentence of life without parole is as close as we can come now with under-18 murderers, and when this Court barred the death penalty in such cases it implicitly promised that this finality would be available. See *Roper* v. *Simmons*, 543 U. S. 551, 572 (2005).

Once the trial is over and the sentence is imposed, our system should assure the victims that the sentence will be carried out absent the most compelling reasons. Although our concern for justice for the defendant has prompted us to make multiple reviews of the conviction and sentence available, the bar for a reason to be deemed sufficiently compelling to set aside the sentence should be raised substantially higher at each review.

Establishing those higher standards for subsequent reviews has been a major part of this Court's jurisprudence from the mid-1970s to the present. The claim with the least relation to the justice of the individual case was banished from relitigation on habeas corpus in *Stone* v. *Powell*, 428 U. S. 465, 494-495 (1976). Different standards of retroactivity were established for direct review and habeas corpus in *Griffith* v. *Kentucky*, 479 U. S. 314, 322-323 (1987), and *Teague* v. *Lane*, 489 U. S. 288, 310 (1989) (plurality opinion). A less stringent standard for harmless error for constitutional claims on habeas corpus was established in *Brecht* v. *Abrahamson*, 507 U. S. 619, 638 (1993). The practice of using later rounds of review to bring up claims that could have been raised earlier was curtailed in *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977), *Coleman* v.

Thompson, 501 U. S. 722, 750 (1991),[2] and *McCleskey* v. *Zant*, 499 U. S. 467, 493 (1991).

These changes in collateral review were often based on the recognition that earlier cases allowing a complete "do over" on habeas corpus or even on a successive habeas petition had failed to give proper weight to the interest in finality. See *Teague*, 489 U. S., at 305-310; *Coleman*, 501 U. S., at 750; see also *McCleskey*, 499 U. S., at 495 (acknowledging difference from prior standard).

This structure, so carefully crafted over so many years, is now in danger. The promise of finality that this Court made to the families of victims of juvenile murderers in *Roper* is now in danger. Victims' families who endured the trial, appeal, state collateral review, and federal habeas and who believed with good reason that it was finally, completely over are now faced with the possibility of receiving a life sentence of their own, repeatedly needing to go back to oppose parole and thus relive the old, painful memories.

Even worse, they may see the perpetrator released after an inadequate time in prison, and for many murders, including many by 17-year-olds, anything less than true life is inadequate. In some cases the killer may kill again. The retroactivity of *Furman* v. *Georgia*, 408 U. S. 238 (1972) did, in fact, kill innocent people. See, *e.g.*, G. Cartwright, Free to Kill, Texas Monthly (Aug. 1992), http://www.texasmonthly.com/articles/free-to-kill-2/ (Kenneth McDuff). Notwithstanding the unsupported claims that resentencing will be more "accurate," see Brief for Douglas Berman as *Amicus*

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2. An exception to the *Coleman* rule was created in *Martinez* v. *Ryan*, 566 U. S. __, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012).

Curiae 3,[3] there is no reason for confidence that the authorities are getting better at deciding whom to release. See, *e.g.*, Center on Media, Crime and Justice, D.C. Murders Rise, Many Involving Recently Released Prisoners (Aug. 14, 2015), http://www.thecrimereport.org/news/crime-and-justice-news/2015-08-dc-murders-released-felons.

Murder is unique in its " 'severity and irrevocability.' " *Kennedy* v. *Louisiana*, 554 U. S. 407, 438 (2008). Murder—at least if we put to one side accomplice liability and the felony-murder rule—is a special crime in that no punishment we have is disproportionate to the crime. Even death by lethal injection, *i.e.*, under sedation, is far less than the excruciatingly painful deaths that nearly all murderers have inflicted on their victims. When we choose a lesser punishment, that is mercy, not justice. Mercy is often the right thing to do, but our system of justice cannot impose an *unjust* punishment on a person who intentionally and unlawfully kills another with malice aforethought. The worst we have is no more than he deserves.

Given the unique severity and permanence of the crime of murder, and given that the maximum punishment is much less than the perpetrator inflicted on the victim, finality should have special weight in murder cases. Only exceptionally compelling circumstances justify reopening a judgment for murder. No such circumstances are present in this case.

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3. In addition, because the single most important factor in the punishment a criminal deserves is the specifics of the crime he chose to commit, the unavailability of witnesses to old cases is just as much a problem in resentencing as it is in retrial.

II. The first *Teague* exception, properly understood, is limited to rules that make the defendant "actually innocent" within the meaning of *Sawyer* v. *Smith*.

A. Actual Innocence in Modern Habeas Corpus Law.

Teague v. *Lane* was not decided in a vacuum. It was part of a body of jurisprudence that recognized that prior cases had gone too far in reopening final criminal cases to successive attacks and had placed too little value on finality. See *supra*, at 6. An argument could be made that in the "massive resistance" era of the 1950s and 1960s, intrusive federal court reexamination of state criminal cases was necessary, especially in cases such as *Brown* v. *Allen*, 344 U. S. 443 (1953), involving claims of racial discrimination. But by the mid-1970s that era was behind us, and it was time to retake the lost ground of finality. See *Stone* v. *Powell*, 428 U. S. 465, 493, n. 35 (1976).

The bugle call for this cavalry charge was Judge Henry Friendly's famous article with its equally famous rhetorical question, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970). The answer at the time was that, legally, innocence was indeed irrelevant. For example, newly discovered evidence of a federal procedural claim was a reason for a federal court to reopen a case fully adjudicated by the state court—with no requirement that it cast any doubt at all on the petitioner's guilt—but new evidence that "merely" showed that the defendant was an innocent man wrongly convicted was not. See *Townsend* v. *Sain*, 372 U. S. 293, 317 (1963).[4]

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4. The latter point rarely came up, though, because in nearly all cases there was no doubt of the petitioner's guilt. See Friendly, *supra*, at 145.

Although that was the law's answer at the time, it was the wrong answer. Actual innocence should not only matter, it should be central. Judge Friendly proposed filtering petitions for collateral review of criminal judgments with an additional requirement:

> "[T]he petitioner for collateral attack must show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt." Friendly, *supra*, at 160; see also *Kaufman* v. *United States*, 394 U. S. 217, 235 (1969) (Black, J., dissenting).

The Friendly Filter never became law as a blanket requirement for all collateral attacks, although a plurality of this Court did adopt it for successive petitions in *Kuhlmann* v. *Wilson*, 477 U. S. 436, 454 (1986). However, the thesis that innocence is not just relevant but important shows through in the rules and exceptions to them that have been adopted. As the Court sought to enhance finality with strengthened limits on the misuse of habeas corpus as just another appeal, it also sought to keep the writ available to correct actual injustice. The *Teague* rule and its exceptions are consistent with the developments in other areas of the law of habeas corpus. A summary of these developments is in order before returning to retroactivity.

Fourth Amendment exclusionary rule claims were excluded from federal habeas corpus cases altogether because they virtually never raise a doubt of guilt. See *Stone* v. *Powell*, 428 U. S., at 490. A proposal to extend *Stone* to *Miranda* claims was narrowly rejected, in part because the majority believed such claims can be

relevant to actual innocence. See *Withrow* v. *Williams*, 507 U. S. 680, 692 (1993).

The procedural default rule with its cause-and-prejudice exception was crafted in the belief that "victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard." *Engle* v. *Isaac*, 456 U. S. 107, 135 (1982). Yet to cover the possibility that a rare case might slip through the cracks, the Court established a separate exception for probable innocence alone. See *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986). When the Court adopted the cause-and-prejudice rule for abuse-of-the-writ cases, it extended the actual innocence exception as well. See *McCleskey* v. *Zant*, 499 U. S. 467, 494-495 (1991). Congress also kept actual innocence, albeit modified in scope, as an element of the statutory abusive petition rule in Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See 28 U. S. C. § 2244(b)(2)(B)(ii).[5]

On the same day that the Court established actual innocence as an independent exception to the procedural default rule in *Murray* v. *Carrier*, it also wrestled with the application of that exception to a sentencing claim in *Smith* v. *Murray*, 477 U. S. 527, 537 (1986). "We acknowledge that the concept of 'actual,' as distinct from 'legal,' innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense." The Court did not

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5. The statutory definition is limited to innocence "of the underlying offense." This paragraph is for claims previously designated "abusive," *i.e.*, those not presented in a prior habeas petition. Congress took a tougher stand with repeated presentation of a previously rejected claim, previously designated "successive." For state prisoners, it supplanted *Kuhlmann*, *supra*, with a flat prohibition. See § 2244(b)(1). For federal prisoners, though, actual innocence remains relevant for both kinds of claims. See § 2255(h)(1).

establish a clear definition of "innocence of the penalty" in *Smith* or in *Dugger* v. *Adams*, 489 U. S. 401 (1989), a decision handed down in the same session as *Teague*. The Court in that case did, though, squarely reject a "miscarriage of justice" argument very similar to those being made in the present case.

> "Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent' of the sentence he or she received. The approach taken by the dissent would turn the case in which an error results in a fundamental miscarriage of justice, the 'extraordinary case,' *Carrier*, *supra*, at 496, into an all too ordinary one." *Id.*, at 412, n. 6.

The clear definition of "actually innocent," or, equivalently, of "miscarriage of justice," came in *Sawyer* v. *Whitley*, 505 U. S. 333 (1992). The Court noted that there were three options for defining actual innocence. See *id.*, at 343. It might be limited to guilt of the offense only, it might include eligibility for the punishment as well, or it might encompass a wide-ranging consideration of the aggravating and mitigating factors in the case. The Court, by a solid majority, chose the middle ground, holding "that the 'actual innocence' requirement must focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional violation." *Id.*, at 347.

In the years since, the Court has looked to the question of whether a petition claimed a miscarriage of justice in other contexts outside the procedural default and successive petition rules. In *Calderon* v. *Thompson*, 523 U. S. 538 (1998), the Court was presented with the novel question of whether it was an abuse of

discretion for a Court of Appeals to recall its mandate in order to reconsider its decision after this Court had denied certiorari. The Court rejected an argument that AEDPA controlled the case. See *id.*, at 554. However, this new issue had to be decided in accordance with the principles of the finality-enhancing cases discussed above, see *id.*, at 554-556, and in accordance with the spirit of AEDPA, even if the letter did not govern the situation. Based on this analysis, the mandate could only be recalled "to avoid a miscarriage of justice *as defined by our habeas jurisprudence.*" *Id.*, at 558 (emphasis added). "The miscarriage of justice standard is altogether consistent with AEDPA's central concern *that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence.*" *Ibid.* (emphasis added). This, says the *Calderon* Court, is an overall principle broadly applicable to habeas corpus, not narrowly confined to a few particular rules.[6] This Court further broadened the miscarriage of justice principle and emphasized its importance in balancing finality with the interests of justice in *McQuiggin* v. *Perkins*, 569 U. S. __, 133 S. Ct. 1924, 1931-1932, 185 L. Ed. 2d 1019, 1030-1032 (2013).

Bell v. *Thompson*, 545 U. S. 794, 809 (2005), like *Calderon*, involved an "extraordinary departure from standard appellate procedures," and again the absence of any substantial claim of a "miscarriage of justice" as defined in *Sawyer* and *Calderon* was dispositive. As in *Calderon*, the Court of Appeals had reopened the case long after this Court's disposition would normally have meant the case was final. See *id.*, at 800-801.

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6. The present case is, of course, not a federal habeas corpus proceeding and AEDPA could not directly apply. However, it is a federal review of a long-concluded criminal case, and the concerns underlying AEPDA apply here, as they did in *Calderon*, though the statute itself does not.

> "The dissent suggests that failing to take account of the [psychiatric] evidence would result in a 'miscarriage of justice,' *post*, at 814–815, 828, but the dissent uses that phrase in a way that is inconsistent with our precedents. In *Sawyer* v. *Whitley*, 505 U. S., at 345–347, this Court held that additional mitigating evidence could not meet the miscarriage of justice standard. Only evidence that affects a defendant's eligibility for the death penalty—which the [psychiatric] evidence is not—can support a miscarriage of justice claim in the capital sentencing context. *Id.*, at 347; *Calderon*, 523 U. S., at 559–560." *Id.*, at 812.

A consistent theme runs through *Sawyer*, *Calderon*, and *Bell*. The possibility that a sentence might have been "inaccurate" in the sense that the sentencer might have chosen a penalty less than the maximum for the crime was not a miscarriage of justice sufficient to make an exception and reopen an otherwise completed case. Any sentence within the legal range for the crime the defendant chose to commit is *per se* on a lower order of concern than the conviction of an innocent person or the imposition of a sentence greater than the maximum allowed by law.

B. Retroactivity.

With this "big picture" in mind, we return to the evolution of the current doctrine of retroactivity. In his dissent in *Desist* v. *United States*, 394 U. S. 244, 258 (1969), Justice Harlan proposed that all new rules apply retroactively on direct review. For habeas corpus, this first draft of his proposal said,

> "First, [habeas corpus] seeks to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted. It follows from this that all

> 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas. In [other] cases, the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place." *Id.*, at 262-263.

Two years later, Justice Harlan refined his position in his concurring and dissenting opinion in *Mackey* v. *United States*, 401 U. S. 667 (1971). He noted that the Fourteenth Amendment has always required essential fairness and that the correctness of new rules is often merely a matter of opinion. See *id.*, at 689-690 (quoting *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring in the judgment)). Implicit in this discussion is a recognition that the further along we go in the development of constitutional criminal law, the less fundamental and the less essential the rules remaining to be made become. If a rule were truly essential to fundamental fairness and justice, it would have been discovered before 1971 and certainly long before 2012.

Most importantly for this case, Justice Harlan revised his proposed exceptions. The first exception would be for "rules that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe . " *Id.*, at 692. He was particularly thinking of the "substantive due process" cases. See *ibid.* This is an innocence-protection exception. If a married couple were actually in jail for violating an "uncommonly silly law" against using contraceptives, see *Griswold* v. *Connecticut*, 381 U. S. 479, 527 (1965) (Stewart, J., dissenting), the unconstitutionality of that law, see *id.*, at 485 (opinion of the Court) would render them actually innocent of any crime.

For the second exception, Justice Harlan reconsidered his earlier proposal and proposed instead that a new rule of procedure be retroactive only if it met the standard of *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937), "implicit in the concept of ordered liberty." *Mackey*, 401 U. S., at 693. This was the standard for whether a rule was required in state proceedings by the Due Process Clause of the Fourteenth Amendment before that clause was thought to incorporate the bulk of the provisions of the first eight amendments. See *Palko*, *supra*, at 324-327. Again, this strongly implies that few, if any, qualifying new rules remained to be made in 1971. Justice Harlan could only identify one qualifying rule anywhere close to recent, made eight years earlier. He believed that the rule of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) could have and should have been created under the *Palko* test rather than incorporating the Sixth Amendment. See *Gideon*, *supra*, at 352 (concurrence); *Mackey*, *supra*, at 694. By going back to *Palko*, though, Justice Harlan was, in part, letting go of the focus on innocence. See *Mackey*, *supra*, at 694.

The first half of Justice Harlan's thesis was adopted by this Court in *Griffith* v. *Kentucky*, 479 U. S. 314, 321-323 (1987), and a four-Justice plurality adopted the second half in *Teague* v. *Lane*, 489 U. S. 288, 310 (1989), with modifications. Justice White, the fifth vote for a majority for the rest of Justice O'Connor's opinion, wrote a grumbling concurrence in the result saying that the plurality opinion was "an acceptable application in collateral review" of a line of cases he did not agree with but had "insufficient reason to continue to object to." See *id.*, at 317. Four months later, he joined in the holding that *Teague* applied in a majority opinion in *Penry* v. *Lynaugh*, 492 U. S. 302, 313-314 (1989), and

the *Teague* plurality has been treated as the definitive word ever since.[7]

The present case involves only the exceptions to the *Teague* rule, as no one doubts that *Miller* v. *Alabama* is a new rule. *Teague* simply restated the first exception by quoting Justice Harlan in *Mackey*. No discussion was required, as Teague's claim obviously did not qualify by any definition of this exception.[8]

For the second exception, *Teague* returned to the "actual innocence" focus that Justice Harlan had advanced in *Desist* but retreated from at least partially in *Mackey*. "[S]ince *Mackey* was decided, our cases have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review." *Teague*, 489 U. S., at 313 (citing *Kuhlmann*, *Murray* v. *Carrier*, and *Stone*). To qualify under this exception, a new rule would have to be both fundamental and one "without which the likelihood of an accurate conviction is seriously diminished." *Ibid.* In 1989, it was "unlikely that *many* such components of basic due process have yet to emerge." *Ibid.* (emphasis added). As time went on, "many" would change to "any." See *Tyler* v. *Cain*, 533 U. S. 656, 667, n. 7 (2001).

Both exceptions, then, are "actual innocence" exceptions. The first one, from the beginning, operated in cases where the new rule by its own force renders the

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7. All further cites to *Teague* in this brief are to the plurality opinion.

8. Whether this is an exception to the rule or a limit on the scope of the rule is purely academic, as we get to the same result either way. It is reminiscent of the old debate over whether a statement of a party opponent is an exception to the hearsay rule or not hearsay. Compare Fed. Rule Evid. 801(d)(2), with Cal. Evid. Code § 1220.

petitioner innocent. See *supra*, at 15. The second provides relief from procedures so deeply, fundamentally flawed that wholesale convictions of innocent people are likely. At least it would in theory, if any such procedure had somehow escaped the intense constitutional scrutiny of criminal procedure that had already been going on for nearly three decades when *Teague* was decided a quarter century ago.

C. The First Exception and Sentencing.

In Part IV-A of *Penry* v. *Lynaugh*, a unanimous Court addressed the question of whether, if a categorical rule against "execution of mentally retarded persons"[9] were to be created, it would be subject to the *Teague* rule. As proposed in *Mackey* and adopted in *Teague*, the exception was for rules that rendered conduct innocent, *i.e.*, "'"beyond the power of the criminal law-making authority to proscribe."'" *Penry*, 492 U. S., at 329 (quoting *Teague*, quoting *Mackey*). That certainly did not apply to Penry's conduct—rape and murder aggravated by two prior rapes. To extend the exception to exempt mentally retarded persons would require an extension of the exception.

The Court had no difficulty making the required extension, though. It is the only holding in the case that was not the subject of a sharp division. The possibility that a sentence could be a fundamental miscarriage of justice had already been recognized in *Smith* and *Dugger*, and though the precise definition had not been spelled out yet, it had been established that a mere possibility of an "inaccurate" sentence was not sufficient. See *supra*, at 12. The Court noted that

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9. "Mentally retarded" was the preferred term at the time, endorsed by advocates for the retarded and used by the *Penry* Court.

"Justice Harlan did speak in terms of substantive constitutional guarantees accorded by the Constitution, *regardless of the procedure followed*." *Penry*, 492 U. S., at 329 (emphasis added). "In our view, a new rule placing a certain class of individuals *beyond the State's power to punish by death* is analogous to a new rule placing certain conduct beyond the State's power to punish at all." *Id.*, at 330. (emphasis added).

These passages suggest a straightforward test for whether a rule comes within the exception. Given the facts as found, undisputed, or assumed for the purpose of the appeal,[10] is it beyond the power of the state to impose this penalty on this defendant for this crime, "regardless of the procedure followed"? Otherwise, if this penalty can be imposed if proper procedures are followed, then the rule does not qualify for the exception.

This point is reinforced by another quote from *Mackey*, " 'There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose.' " *Penry*, 492 U. S., at 330. The criminal process comes to rest at the final judgment of the court—the conviction of a crime and the sentence imposed for it. The location of that point is clearly and cleanly distinguishable from the path taken to reach that point. If the new rule makes resting at that point illegal *per se* on the facts of the case without regard to how that point was reached, it is a first-exception new rule.

Other aspects of the *Teague* rule have been the subject of sharp disagreement within this Court, but the scope of the first exception has not. The unanimity

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10. Penry was not mentally retarded, a jury eventually found. See *Penry* v. *State*, 178 S. W. 3d 782, 785 (Tex. Crim. App. 2005).

of Part IV-A of *Penry* has continued to the present on this aspect of rule as clearly and crisply defined in that case.

A number of post-*Teague* cases, including *Penry*, have involved claims like the present one in which the claimed error involved the inability of the sentencer to choose a lesser sentence based on mitigating circumstances. In *Penry* itself, while retardation as a categorical exemption would have been a first-exception rule, retardation as a mitigating circumstance that the sentencer must be allowed to consider was not. The majority held that the Texas system was inadequate in this regard and further held that this rule could be applied to Penry on the theory that it was not new. 492 U. S., at 318-319. The latter was a dubious conclusion. See *id.*, at 352-353 (Scalia, J., dissenting, joined by Rehnquist, C. J. and White and Kennedy, JJ.). No member of the Court expressed a view that the rule came within the first exception.

Fortunately, the report that *Teague* had been "gutted," see *id.*, at 353, proved to be exaggerated. Thereafter, the Court repeatedly applied *Teague* to preclude arguments that the sentencer had been unable to grant a lesser sentence based on some arguably precluded consideration, dismissing out of hand any possibility that the first exception applied. While these decisions were often divided on other grounds, not once did a single Justice assert the first exception as a reason for disagreement. See *Saffle* v. *Parks*, 494 U. S. 484, 486, 494-495 (1990) (sympathy); *id.*, at 507 (Brennan, J., dissenting) (second exception); *Graham* v. *Collins*, 506 U. S. 461, 463, 477 (1993) (Texas special issues and background mitigation, first exception plainly inapplicable); *id.*, at 511-512 (Souter, J., dissenting) (not new, not distinguishable from *Penry*); *Beard* v. *Banks*, 542 U. S. 406, 408, 417 (2004) (mitigating circumstance

found by less than all jurors, "no argument"); *id.*, at 422 (Stevens, J., dissenting) (not new).

Lockett v. *Ohio*, 438 U. S. 586, 597-605 (1978) (plurality opinion) was built on the foundation of *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), and its prohibition of mandatory sentencing in capital cases. The Ohio statute was effectively mandatory as to Lockett because it did not allow consideration of her substantial mitigating circumstances of "her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime." *Lockett*, *supra*, at 597. The rules and proposed rules in *Penry* (jury instruction part), *Saffle*, *Graham*, and *Beard* are all derived from *Lockett* and therefore belong to the branch of capital jurisprudence begun with *Woodson*. Yet it has been clear beyond dispute the entire time that these rules are not exempt from *Teague*'s prohibition of retroactivity under the first exception, or, stated differently, that they are rules of criminal procedure within the scope of *Teague* and not rules of substantive law outside its scope. See *Beard*, 542 U. S., at 411, n. 3.

Petitioner notes that the early cases in this line, *Woodson*, *Lockett*, and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), were applied retroactively in a number of Court of Appeals decisions, *all* of which predate *Teague*. Brief for Petitioner 26-27, and n. 12. He then asserts baldly, "The rationale for holding these cases retroactive is similarly applicable here." Obviously not. The rule governing retroactivity at the time of these cases was the one *Teague* overruled and replaced, having found it inadequate.

Petitioner cites *Thigpen* v. *Thigpen*, 926 F. 2d 1003, 1005 (CA11 1991), a case that postdates *Teague*, as applying *Sumner* v. *Shuman*, 483 U. S. 66 (1987), retroactively. It does not. In that case the District Court granted penalty relief on *Shuman* grounds but

upheld the conviction. Petitioner appealed, but the state did not cross-appeal. *Shuman* and its retroactivity were not at issue.

Under the jurisprudence of *Teague* as understood to date, *Miller* v. *Alabama* is subject to the *Teague* bar against retroactivity on habeas corpus.

III. *Teague* should not be watered down to extend the reach of a sharply divided decision.

Part II of this brief refutes the argument that the "first exception" or the substantive/procedural distinction as understood to date supports applying *Miller* v. *Alabama* retroactively to cases already final at the time it was decided. The Solicitor General as *amicus* suggests that the existing exception be widened in order to do what current law forbids. This suggestion should be rejected.

Teague v. *Lane*, 489 U. S. 288 (1989), and *Griffith* v. *Kentucky*, 479 U. S. 314 (1987), together formed a landmark reworking of retroactivity law, replacing a prior doctrine that had become "almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim." *Mackey* v. *United States*, 401 U. S. 667, 676 (1971) (Harlan, J., concurring and dissenting). In place of the rule-by-rule adjudication based on vague factors, *Griffith/Teague* established a more principled system in which new rules would apply retroactively on direct review in all cases and would not apply retroactively in habeas corpus in nearly all cases.

The primary exception to the *Teague* bar (or exclusion from its scope) was crisply defined and has presented little difficulty to date. Other than the Ninth Circuit's strange decision in *Summerlin* v. *Stewart*, 341 F. 3d 1082 (2003) (en banc), which this Court reversed

without dissent on the "first exception" point in *Schriro* v. *Summerlin*, 542 U. S. 348 (2004), the rule has been easily and correctly applied to those cases and only those cases where the new rule renders the defendant innocent of the crime or innocent of the penalty. The second exception is dead and awaiting only its official burial. It is for cases with the "primacy and centrality of the rule adopted in *Gideon*." *Saffle*, 494 U. S., at 495. This Court has not found a single such rule since *Teague* and has acknowledged it is not likely to ever find one. See *supra*, at 17.

There is no need to weaken this structure by widening existing exceptions or creating new ones. This Court has repeatedly recognized that a sentence within the allowable range for the crime the defendant actually committed is not a miscarriage of justice warranting a departure from the regular rules that have been created to protect the interest in finality. The interest in finality is not limited to the state, as every one of the "top side" briefs to address the issue assumes, but it is also a powerful interest of the victims of crime, including the families of homicide victims. The people of California have elevated this interest to a constitutional right:

> "Victims of crime are entitled to finality in their criminal cases. Lengthy appeals and other post-judgment proceedings that challenge criminal convictions, frequent and difficult parole hearings that threaten to release criminal offenders, *and the ongoing threat that the sentences of criminal wrongdoers will be reduced*, prolong the suffering of crime victims for many years after the crimes themselves have been perpetrated. This prolonged suffering of crime victims and their families must come to an end." Cal. Const., Art. I, § 28(a)(6) (emphasis added).

Retroactive application of *Miller* would inflict upon the families of the victims in every case of murder committed by a 17-year-old or younger—regardless of how heinous the crime and regardless of how close to the magic 18th birthday the perpetrator was—the pain of reopening old wounds and the possibility that the murderer may receive a reduced sentence and subsequently be released because the authorities are no longer willing to spend the resources to mount an effective opposition.

One reason for not giving a decision a disruptive, retroactive reach is simply the judicial humility of understanding that the rules created in the decisions of a court are frequently matters on which reasonable people may differ. " '[R]eversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.' " *Mackey* v. *United States*, 401 U. S. 667, 690 (1971) (opinion of Harlan, J.) (quoting *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring)).

This is particularly true when this Court is sharply divided, and the decision could have easily gone the other way if it had come before the Court at a time when its composition differed only slightly. The more divided the Court is, the less likely the resulting rule is to be a fundamental one that warrants reopening decades-old judgments.

For the cases that seem to be the strongest ones for reexamination, there may be other remedies available. Justice Breyer's concurrence in *Miller* v. *Alabama*, 567 U. S. __, 132 S. Ct. 2455, 2476-2477, 183 L.Ed.2d 407, 431-432 (2012), would hold that the limitations on sentencing of adult felony-murder accomplices to death

also apply to sentencing juveniles to life without parole. Such a limitation, if adopted, would be a substantive one applying retroactively. A substantive cutoff for very young defendants is also a possibility to be considered. See *Thompson* v. *Oklahoma*, 487 U. S. 815, 838 (1988) (plurality opinion) (setting a cutoff of 16 in capital cases).[11]

If we put the felony-murder cases to one side, none of the remaining cases present the kind of miscarriage of justice that calls for reopening closed cases. As discussed in Part I, *supra*, murder is unique in that a murderer *cannot* receive a sentence that is disproportionate to the harm he inflicted. For juvenile murderers exempt from the death penalty, they must necessarily receive a penalty that is *less* than proportionate. This is *Coker* v. *Georgia*, 433 U. S. 584, 598 (1977) (plurality opinion), in reverse. Just as death was necessarily more than a proportionate punishment for a rapist who does not kill, so life in prison is necessarily less than proportionate for a murderer who does kill. "Life is over for the victim of the murderer; for the [life-sentenced murderer], life may not be nearly so happy as it was, but it is not over and normally is not beyond repair." A life-sentenced murderer, though confined in prison with no eligibility for parole, may yet find a meaningful life. A murder victim cannot.

A call to forgive and relent for a person convicted of murder at 17 or younger is a call for mercy, not justice. The United States Constitution does provide for an unlimited power to dispense mercy, but it is vested in the executive branch, not the judiciary, see U. S. Const.,

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11. A strong argument has been made that 16 would have been a better place to draw the line in *Miller* itself. See Douglas, A Suggested Minor Refinement of *Miller v. Alabama*, 46 McGeorge L. Rev. 907 (2014).

Art. II, § 2, and that is generally true throughout the country. See, *Ohio Adult Parole Authority* v. *Woodard*, 523 U. S. 272, 284-285 (1998) (plurality opinion).

Executive action is a genuine avenue for relief and not an empty one as it is so often portrayed. Sentences can be commuted, and prosecutors can stipulate to relief. The *Teague* bar can be waived. See *Collins* v. *Youngblood*, 497 U. S. 37, 41 (1990). A case presenting the same question as the present case, taken up by this Court in the previous term, presented a substantial case for mercy, but it was mooted when the prosecutor agreed to relief. See *Toca* v. *Louisiana*, __ U. S. __, 135 S. Ct. 1197, 191 L. Ed. 2d 149 (2015); J. Simerman, George Toca, La. Inmate at Center of Debate on Juvenile Life Sentences, to Go Free, The New Orleans Advocate (Jan. 30, 2015), http://www.theneworleansadvocate.com/news/11462053-123/george-toca-louisiana-inmate-at. While executive authority in this area can sometimes be abused, see *Santos* v. *Brown*, 238 Cal. App. 4th 398, 404 (2015), the actions of executive officers answerable to the people through contested elections are, on the whole, less of a threat to the interests of victims than the wholesale reopening of cases for judicial reconsideration.

The Solicitor General proposes to distort the previously straightforward law of the first *Teague* exception by expanding it to include new rules of law that extend the sentencer's options downward. There is no difference, in terms of the existence of a "fundamental miscarriage of justice" between a lower sentence being out of reach because of statutory floor and that same sentence being out of reach because the sentencer was unable to consider the circumstances that would warrant it. Either way, the habeas petitioner is claiming that the end point of the process is a sentence that is allowed by law for the crime he committed yet higher

than the one he might (or might not) have received if the new rule had been in effect at the time of his trial. Claims of the second type have repeatedly been held to be obviously not within the scope of either exception throughout the history of the *Teague* rule. See *supra*, at 21. Claims of the first type have no greater claim to be miscarriages of justice of the kind that motivated the creation of that exception.

The Solicitor General's proposal to expand the first *Teague* exception should be rejected. The exception, or the exclusion from the scope of the *Teague* rule, should be retained as it was stated in *Penry* v. *Lynaugh* and expanded no further.

IV. *Teague* applies fully to noncapital sentencing and should continue to.

Most of the *amici* supporting petitioner assert that *Miller* v. *Alabama* should qualify for an exemption from the rule of *Teague* v. *Lane*, but *amicus* Professor Douglas Berman makes the astonishing proposal of exempting noncapital Eighth Amendment sentencing claims from the *Teague* rule altogether, substituting a test so loose that retroactivity would be the norm rather than the exception. See Brief of Professor Douglas A. Berman as *Amicus Curiae* 6-13 (Berman Brief).

Professor Berman asserts that *Caspari* v. *Bohlen*, 510 U. S. 383 (1994), "assumed, without deciding, that *Teague* applied to a Fifth Amendment rule concerning noncapital sentencing." Berman Brief 6, n. 2. *Caspari* deserves more weight than that. The case involved a noncapital sentencing issue, and this Court stated the *Teague* rule and proceeded to apply it. The Court refers to a "conviction and sentence becom[ing] final for purposes of retroactivity analysis," *Caspari*, at 390,

indicating an understanding that conviction and sentence were governed by the same analysis.

Together with the application of *Teague* to Eighth Amendment claims in numerous capital sentencing cases, this leaves Professor Berman arguing that even though *Teague* applies to Eighth Amendment capital sentencing cases and even though it applies to noncapital sentencing cases under other provisions of the Bill of Rights, *Teague* should not apply to the niche of Eighth Amendment noncapital sentencing cases. The lynchpin of this argument is a supposed reduced interest in finality. See Berman Brief 7.

Professor Berman has submitted a brief to this Court on the interests of finality in criminal cases, and the word "victim" cannot be found a single time in the entire brief. This giant blind spot is regrettably common in American law schools. See Beloof, Cassell, and Twist, *supra*, at 3. One example will suffice to show how this blind spot distorts the analysis.

Rape victims go through hell not only in the crime itself but also in the aftermath. Among the nightmares of the aftermath is the fear that the perpetrator will get out and come after the victim, seeking revenge for her report and testimony. The fear is well founded. See, *e.g.*, *People* v. *Edelbacher*, 47 Cal. 3d 983, 1027, 766 P.2d 1, 27 (1989).

If a new procedural Eighth Amendment rule were made affecting sentencing in rape cases, could anyone seriously say that a rape victim had no substantial interest in avoiding its retroactive application? Suppose, God forbid, that this Court were to bring back the Eighth Amendment rule of *Booth* v. *Maryland*, 482 U. S. 496 (1987), overruled in *Payne* v. *Tennessee*, 501 U. S. 808, 830 (1991), and apply it to noncapital cases so as to invalidate rape sentences where the victims

testified to the impact of the crime on them and their lives.[12] The rule would apply to all cases then on direct review, but certainly victims of rape would have a powerful interest in not seeing it apply to final cases.

Victims of crime have powerful interest in the continued vigor of the *Teague* rule. It was primarily for the benefit of victims that *amicus* CJLF advocated the rule in the first place. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Teague* v. *Lane*, No. 87-5259, p. 2. That interest extends to sentencing as much as it does to guilt, and there is nothing about Eighth Amendment claims as distinct from others that diminishes this interest one iota. The proposal to carve out one niche of claims from the scope of the *Teague* rule should be rejected.

V. Calling 17-year-old murderers "children" is deeply offensive to many families of the victims killed by them.

In light of the unfortunate terminology used by this Court in *Miller* v. *Alabama*, 567 U. S. __, 132 S. Ct. 2455, 2470, 183 L. Ed. 2d 407, 425 (2012), *amicus* believes that a note on choice of words is in order. The holdings of courts are most important, of course, but the way those holdings are expressed also matters.

The word "child," in contemporary American usage, usually refers to a person younger than adolescence. See American Heritage Dictionary 332 (3d ed. 1992); Webster's II New Collegiate Dictionary 198 (3d ed. 2005). Few people today ever refer to teenagers as "children."

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12. It would, of course, be appalling for this Court to actually make such a rule, but *Booth* itself was appalling, and it was the law for four years.

It is precisely *because* the word "child" evokes an image of an elementary school youngster that the advocates of lenient sentencing have adopted that word in referring to juvenile offenders. See, *e.g.*, Human Rights Watch, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States (2005). The mental image that term evokes strikes an emotional chord, but it is a false image. Life without parole for juveniles is only for murder after *Graham* v. *Florida*, 560 U. S. 48 (2010), and the vast majority of homicides by juveniles are committed by older teenagers. For example, among juveniles arrested for homicide in 2011, only 11% were under 15. See Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, Juvenile Arrests 2011, p. 3 (Dec. 2013).

In legal usage, as well as common usage, the terms "juvenile" or "minor" are generally the words for referring to the entire class of persons under 18. "Child" is typically reserved for pre-teens. See Garner, Dictionary of Legal Usage 153 (3d ed. 2011). This Court used the term "juvenile" in the cases prior to *Miller*, see, *e.g.*, *Graham*, 560 U. S., at 52, and *amicus* respectfully requests that it do so again.

Use of the term "children" to refer to 17-year-old thugs who commit crimes of great violence is profoundly offensive to those who have suffered at their hands. Henry Montgomery was not a "child" when he killed Deputy Hurt. Falsely calling him one clouds rather than clarifies the issue in this case, and it is a slap in the face to those who have suffered from this crime.

VI. To the extent Montgomery seeks mercy rather than justice, his request should be addressed to the clemency authority, not the courts.

Montgomery received a just sentence for the crime he committed. He has had life and the opportunity to find meaning in it; Deputy Hurt has not.

According to his attorneys, Montgomery has indeed found a meaningful life within prison.

> "Evidence also indicates that Mr. Montgomery has indeed been rehabilitated. As an immature youth entering the notoriously oppressive, corrupt and violent adult Louisiana farm-labor punishment system, Mr. Montgomery originally struggled with his adjustment to prison. In his more than fifty years in that system, Mr. Montgomery, now 69 years old, has grown and matured. J.A. 19-20. Even without hope of release, he has served as a coach and trainer for a boxing team he helped establish, has worked in the prison's silkscreen department, and strives to be a positive role model and counselor for other inmates. J.A. 20." Brief for Petitioner 7.

That is all good, if true and if not counterbalanced by other facts counsel chose not to tell. None of it has any bearing on whether the judgment originally imposed was a just one. By the standards of the day, the sentence was not merely just but lenient. By today's standards, it is both within the allowable range and less than proportionate to the crime committed.

What Montgomery seeks is mercy, not justice. Mercy may very well be appropriate in this case. If he has genuinely been rehabilitated, perhaps the retribution interest has been satisfied and he presents no public danger. But that call is not this Court's to make.

The people of Louisiana have seen fit to vest the power to dispense mercy in the Governor of the State, upon recommendation of a Board of Pardons appointed by the Governor. See La. Const., Art. IV, § 5(E). The executive has long been considered the appropriate branch for this power. See The Federalist No. 74, pp. 446-448 (C. Rossiter ed. 2003) (A. Hamilton). That is where the request to reduce Montgomery's sentence should be addressed.

CONCLUSION

The decision of the Louisiana Supreme Court should be affirmed.

August, 2015

Respectfully submitted,

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